

Durmaz (Migration) [2019] AATA 301 (16 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Hatice Durmaz

CASE NUMBER: 1712907

DIBP REFERENCE: BCC2016/1779015

MEMBER: Rosa Gagliardi

DATE: 16 January 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa:

- cl.820.221(3) of Schedule 2 to the Regulations.
-
-

4:46pm

Statement made on 16 January 2019 at

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – sponsorship ceased – family violence – genuine and continuing relationship at time of application – documentary evidence submitted of couple in social settings – decision under review set aside

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), rr 1.21, 1.23 Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 May 2016 on the basis of her relationship with her sponsor, Mr Hamdi Bodic. At that time, Class UK contained Subclass 820. The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.820.211 and 820.221 which require that at the time of application and decision, the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.820.211(8) or (9) and 820.221(3)(a) and (3)(b)(i). The applicant claims this occurred in this case.
4. The delegate refused to grant the visa on the basis that the applicant did not meet cl.820.221 because there was insufficient evidence to demonstrate that the parties had ever been in a genuine and continuing spousal relationship.
5. The applicant appeared before the Tribunal on 7 November 2018 to give evidence and present arguments. The Tribunal also received oral evidence from a significant number of witnesses who were attesting to the genuine nature of the relationship.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. In the present case, the applicant claims the relationship with Mr Hamdi Bodic the visa sponsor has ceased, and she has been the victim of family violence.
9. At the time of application the evidence pointing to the relationship having been a genuine and continuing spousal one as defined by s.5F was limited. At the time of review the applicant has submitted a good deal of credible evidence showing that they had: shared financial arrangements; a shared household; that their relationship was widely recognised as being genuine and continuing; and that they had had a mutual commitment to one another to the exclusion of others and that the parties had seen the relationship as long-term.
10. The Tribunal has sighted photographs of the parties together as a couple and in large groups socialising and having meals together. In addition, a preponderance of written statements has been provided to the Tribunal by witnesses declaring that they have not only socialised with the couple but observed them in their own home sharing household responsibilities. The Tribunal in particular places great store on the letter by the Elder of the Melbourne United Alevis Community Centre Inc, dated 29 October 2018, stating, among other

things, *“I have witnessed on many occasions for Hatice Durmaz and Hamdi Bodic to attend the community’s functions and events as husband and wife and have witnessed both to be very happy and loving. Donations by the couple to support the community was always giving (sic) with their blessing. They would take part and volunteer consistently in the communities (sic) event and would see them work well together, as a couple. I have no doubt in my mind that the relationship between Hatice Durmaz and Hamdi Bodic was sincere, faithful and very loving”*. A further letter was provided by the Elder of the Community Centre as a statutory declaration, also dated 29 October 2018, reinforcing that the applicant and Mr Bodic attended community functions as husband and wife and presented as a couple.

11. In addition, many witnesses gave credible and realistic evidence about the relationship between the applicant and her sponsor and how for all intents and purposes they considered it a genuine spousal relationship, even though they were not privy to the more intimate nature of the alleged family violence and why the relationship ceased.
12. The Tribunal considers that the evidence before it is overwhelming that the parties were in a spousal relationship as defined by s.5F. The Tribunal is persuaded that initially they had a mutual commitment to a shared life together and that they were not living separately and apart on a permanent basis.
13. On the basis of the evidence, the Tribunal is satisfied the applicant and the sponsor were in a partner relationship and that this relationship has ceased. The issue that arises on the evidence in this case is whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.
14. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in r.1.21. These regulations, as relevant to this decision, are extracted in the attachment to this decision. The Tribunal notes that the violence, or part of the violence must have occurred during the relationship: r.1.23(3), (5), (7), (12), (14).
15. In the present case the applicant is seeking to establish family violence on the basis of evidence tested before a Court. Acceptable forms of court tested evidence as set out in r.1.23, are: a court injunction under the *Family Law Act 1975*; an Australian Court order for the protection of the alleged victim; or a conviction or finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim. Where such evidence is provided, the alleged victim is taken to have suffered family violence and the alleged perpetrator is taken to have committed family violence: r.1.23(1).
16. On the applicant’s claims, the only relevant form of evidence is a Court order. The applicant has submitted an Intervention Order taken out by a Member of the Victoria Police to protect the applicant on 20 February 2017 at the Magistrates’ Court at Broadmeadows. The respondent was served with a copy of the application and the summons. The respondent was present at the hearing and the Order was by consent without admission of allegations in complaint.
17. The Tribunal is satisfied that a Court Order was made against the sponsor for the protection of the applicant in relation to violence that occurred whilst the parties were in the relationship, after the sponsor had an opportunity to be heard or otherwise make

submissions to the Court. Therefore, family violence is taken to have occurred under r.1.23 of the Regulations.

18. The Tribunal notes that its inquiry need go no further. It notes in passing, however, that the supporting material relating to the family violence is compelling and includes evidence that the applicant was referred to a psychologist by her then GP, on 5 December 2016, and that counselling sessions began on 14 December 2016 and have continued to the present time in relation to the difficulties the applicant experienced during her marriage to her sponsor.
19. In addition, the Tribunal has sighted evidence of the police referral to a service provider looking after victims of family violence – Safe Steps. It discusses the risk indicators of family violence as being: sexual assaults & coercion; controlling behaviours; and possible alcohol misuse. It also indicates that the applicant was suffering from depression and was being treated with medication.
20. The evidence the applicant also gave at hearing regarding the sexual abuse and humiliation she experienced at being forced to perform sexual acts against her will, was also persuasive.
21. As the relationship between the applicant and sponsor has ceased, and the applicant has suffered relevant family violence committed by the sponsor, the applicant meets the requirements of cl.820.221(3). Given these findings, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for the visa.

DECISION

22. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa:
 - cl.820.221(3) of Schedule 2 to the Regulations.

Rosa Gagliardi
Member

ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.21 Interpretation

...

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

...

violence includes a threat of violence.

...

1.23 When is a person taken to have suffered or committed family violence?

- (1) For the purposes of these Regulations:

- (a) a person (the alleged victim) is taken to have suffered family violence; and
- (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.
- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
 - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.
- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
 - (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

- (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.
- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim is:
 - (i) a spouse or de facto partner of the alleged perpetrator; or
 - (ii) a dependent child of:
 - (A) the alleged perpetrator; or
 - (B) the spouse or de facto partner of the alleged perpetrator; or
 - (C) both the alleged perpetrator and his or her spouse or de facto partner; or
 - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
 - (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
 - (i) the alleged victim has suffered relevant family violence; and
 - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
 - (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
 - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
 - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
 - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
 - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.
- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and

- (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.
- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.